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Newsletters

Winter 1994

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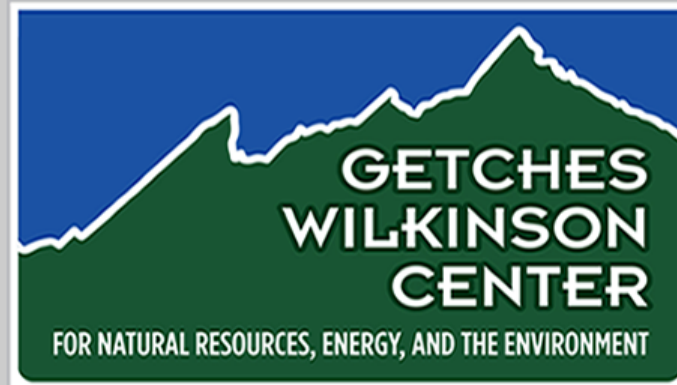
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RESOURCE LAW NOTES

Natural Resources Law Center • School of Law • University of Colorado at Boulder



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Number 30

Winter Issue, January 1994

NRLC Spring Programs:

June Conference Examines Regulatory Takings

The tentative title for the Center's annual June conference, June 13-15, is "Constitutional Limits on Environmental Regulation: Land, Water, and Resources Development and Use." The conference will examine the legal framework within which government regulation of land and resources can govern the manner of development and use of those resources. Particular attention will be given to issues raised by various environmental laws and regulations. The spring issue of *Resource Law Notes* will contain more detail, and brochures will be mailed in the early spring. For more information, contact Kathy Taylor, (303) 492-1288. ♦

NRLC-Boulder Bar Program Set for Feb. 25

The Center's annual symposium with the Natural Resources and Environmental Section of the Boulder County Bar Association will be held Friday, February 25, at the Law School. This year's program will focus on tensions between local, state, and federal governments in environmental protection and land use decisions. Continuing Legal Education credits will be available for participants, and lunch will be provided. We will send brochures to people in Boulder and Denver. Anyone else wishing to receive information should contact Kathy Taylor, (303) 492-1288. ♦

Spring Hot Topics Series Considers Criminal Sanctions for Environmental Violations and other topics

The first program in our spring 1994 Hot Topics in Natural Resources series will feature Jonathan Turley, George Washington University Law Professor, director of the Environmental Crimes Project, and attorney for the Rocky Flats Grand Jury. On Tuesday, February 8, Professor Turley will critique the performance of the U.S. Department of Justice in enforcing the criminal sanction provisions of federal environmental laws, and will discuss this important area of law.

The Hot Topics series will continue on Tuesday, March 8, with a program examining the evolving role of the Public Utilities Commission in implementing integrated resource planning. Christine Alvarez, a member of the Colorado PUC, will moderate the discussion by speakers Bruce Driver (Land & Water Fund of the Rockies), Paula Connelly (Gorsuch, Kirgis, Campbell, Walker & Grover), and Bill Martin (Public Service Company of Colorado).

The final program, held on Thursday, April 7, will provide an overview of the legal issues surrounding ownership and development of coalbed methane. The speaker, Elizabeth McClanahan, is the Center's 1993-1994 El Paso Natural Gas Law Fellow.

The spring Hot Topics programs continue at noon at the 32nd floor conference room at Holland & Hart, 555

17th Street, Denver. Registration is limited and prepayment is required, due to space limitations. Brochures will be sent to those on our mailing list in the Denver metropolitan area. Others wishing to receive more information should call Kathy Taylor, (303) 492-1288. ♦



Colorado Senator Hank Brown delivered the sixth annual Raphael J. Moses Natural Resources Research Lecture on "The Roles of the Federal Government and Local Governments in Land Use Planning," at the Law School on December 1, 1993.

Sponsors Help Make Our Work Possible

In recent months the Natural Resources Law Center has received generous financial support from several Colorado sponsors. The publication of *Resource Law Notes* — mailed free of charge three times a year to over 8,000 natural resources professionals — is now supported in part by a grant from the Coors Pure Water 2000 program, aimed at improving the nation's water resources by promoting cooperative action among industry, the environmental community, government, and the general public.

Several Denver firms have contributed to help make our work possible. **Holme Roberts & Owen** sponsors our annual distinguished visitor, who spends at least one day at the law school, meeting with students, faculty, and alumni, and presents a public lecture on a topic of natural resources law or policy. Last year's visitor was John Echohawk, executive director of the Native American Rights Fund.

The Denver law firm **Holland & Hart** helped us continue our popular Hot Topics in Natural Resources series for the 1993-

1994 academic year by providing a meeting room and helping with lunch service. We are grateful for the donation of these comfortable facilities, which enable us to continue this educational program without raising the registration costs.



We also want to express special appreciation to the **AMAX Foundation** and the **AMAX** operating companies in Colorado, who have supported the Center from its inception, and to the **El Paso Natural Gas Foundation** and the **El Paso Natural Gas Company** for their ongoing support of the El Paso Fellowship program.

We extend our deep appreciation to these sponsors who have made a special effort to support our work. We have acknowledged other individuals and organizations that have provided financial assistance through our Associates Program in past issues of *Resource Law Notes*. Please consider making a tax-deductible contribution or encouraging your firm or company to contribute to the Natural Resources Law Center. ♦

Center Begins Public Lands Series With September Conference

Many people know the Natural Resources Law Center through our June water conference — an annual event for 14 years. We now have initiated a parallel series on western public lands policy, with a conference September 19-21, 1993 called "A New Era for the Western Public Lands."

If the 1993 conference is any indication of things to come, we'll have to plan *big*. The program — which included such national figures as Congressman **George Miller**, BLM Director **Jim Baca**, Interior Solicitor **John Lesby**, Department of State Counselor **Tim Wirth**, and Bureau of Reclamation Commissioner **Dan Beard**, as well as other experts — drew the largest crowd ever to a Center conference, with nearly 300 paid registrants. With strong interest from CU law students as well, we had an overflow crowd for much of the program.

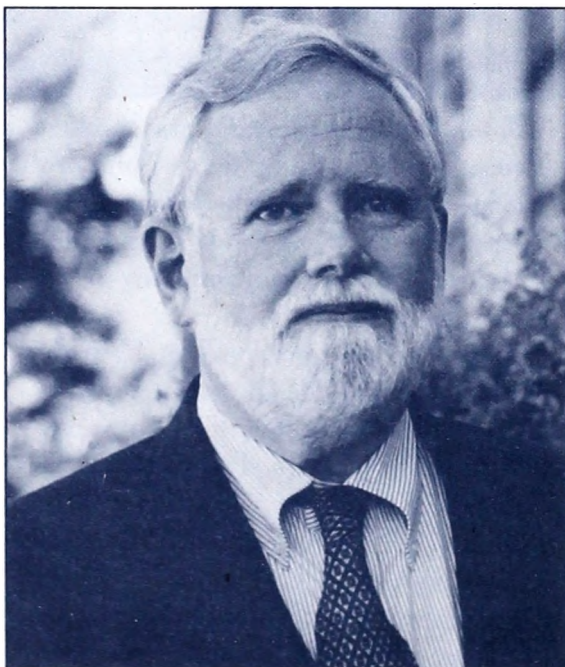
In recognition of his achievements and contributions to the fields of natural resources and public lands law, we dedicated the conference to former law professor and long-time attorney with Davis, Graham & Stubbs, **Clyde O. Martz**. Clyde and his wife Ann attended the opening session and enjoyed the warm dedication speech from CU Law Professor **David Getches**.

The conference was co-sponsored by the Natural Resources Law Center and the University of Colorado Law Review, which will publish a symposium issue of articles by speakers at the program. This collaborative effort was made possible by the generous support of University of Colorado School of Law Dean **Gene R. Nichol** and University of Colorado Chancellor **James N. Corbridge, Jr.** ♦

Fall Visitor Brings International Business Perspective

This fall the Center hosted visiting researcher **Nicholas Smith**, chairman of Reservoir Recovery Specialists of Denver, Colorado. Mr. Smith, whose career has included numerous research and academic appointments, has most recently been working to establish business partnerships for secondary oil recovery in the former Soviet Union. He spent his visit at the Law School researching and writing on legal aspects of these international transactions.

Spring visitors are **Elizabeth McClanahan**, a lawyer from Virginia who was selected as the El Paso Natural Gas Law Fellow for 1993-1994, and **Professor David Farrier**, of the University of Wollongong Faculty of Law, Australia. More on them in the next issue of *Resource Law Notes*. ♦



Nicholas Smith

First Annual Western Lands Conference



Clyde and Ann Martz enjoy tribute to Clyde.



Interior Solicitor John Lesby and Congressmen Miller and LaRocco listen to Rocky Mountain NP Superintendant Homer Rouse on field trip prior to the conference.



Colorado Attorney General, Gale Norton, considers public rights v. private rights.



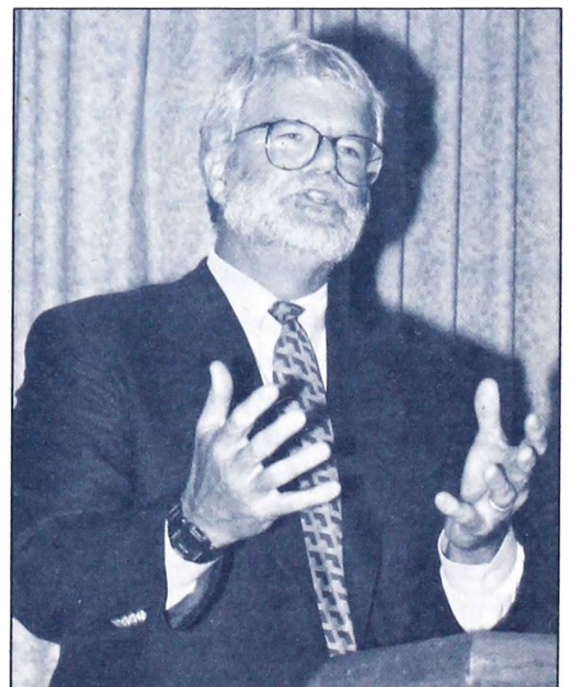
Deborah Callister, Coalition for Utah's Future/ Project 2000, talks with Don Snow, Northern Lights Research & Education Institute.



Dan Beard, Bureau of Reclamation Commissioner, joins Jo Clark, Western Governors' Association, on opening panel.



Former Colorado Senator Tim Wirth visits during lunch.



Congressman George Miller, Chairman of the House Natural Resources Committee, gives keynote address.

Nontributary Ground Water in Colorado: Questions of Use and Abuse

Robert F. Welborn

With this article by Robert F. Welborn, the Natural Resources Law Center is beginning a periodic feature in Resource Law Notes, providing a forum for our readers to express their opinions on important issues of natural resources law and policy.

As a research and public education center at the University of Colorado School of Law, the Natural Resources Law Center maintains its position of neutrality on issues of public policy in order to safeguard the intellectual freedom of its staff and those with whom it associates. Thus, interpretations or conclusions in these articles in Resource Law Notes should be understood to be solely those of the authors.

The subject of this discussion is nontributary ground water outside of designated ground water basins in Colorado. There are serious legal, ethical and environmental questions regarding this state's usage of that water.

There are serious legal, ethical and environmental questions regarding this state's usage of that water.

For decades Colorado has recognized the difference between water which flows in or tributary to the natural streams and water in underground aquifers which are not recharged naturally as water is taken from them and which are not tributary to the streams. A case recognizing and dealing with this difference was *Whitten v. Coit*, 153 Colo. 157, 385 P.2d 131 (1963), which held that rights to nontributary ground water could not be adjudicated

under the statutory procedures (the 1943 Adjudication Act) for the adjudication of water in the streams. In that case, the court cited with approval an article in which it was concluded that nontributary ground water is the property of the landowner.

In the late 1970s John Huston and associates filed applications in all water divisions throughout the state to obtain and adjudicate under the constitutional doctrine of appropriation rights to water in nontributary aquifers. These proceedings as combined became known as the *Huston* case and in its decision the Colorado Supreme Court held that the nontributary ground water could not be appropriated under the procedures applicable to water in or tributary to the natural streams, that rights to it could not be adjudicated under the Water Right Determination and Administration Act of 1969, and that this water was not the property of the overlying landowner but rather in effect public property to be dealt with as such by the legislature. [See *State of Colorado, et al. v. Southwestern Colorado Water Conservation District, et al.*, 671 P.2d 1294 (Colo. 1983).] The court stated as follows:

We hold today, however, that claims for nontributary ground water outside designated ground water basins cannot be adjudicated under the 1969 Act. To the extent that our earlier cases may be interpreted as ruling to the contrary, we shall not follow them. [671 P.2d 1294 at page 1311.]

... we believe that, given the state's plenary control over development of water law, the traditional property concept of fee ownership is of limited usefulness as applied to nontributary ground water and serves to mislead rather than to advance understanding in considering public and private rights to utilize this unique resource. [Id. at 1316.]

The court repudiated the dictum in *Whitten v. Coit, supra*, that the landowner owns the nontributary ground water by saying:

To the extent, however, that it is understood to recognize in a landowner

an interest in nontributary water coextensive with rights of ownership of other interests in real property we consider the description inaccurate and now repudiate it. [Id. 1317.]

The court recognized the finite nature of this nontributary ground water resource and that conservation must be considered by saying:

Tributary waters are not subject to eventual depletion because they are annually replenished, and the vested rights of senior appropriators can be fully protected by seasonal regulation of diversion by junior appropriators. Nontributary ground water supplies, however, may dwindle because water can be withdrawn from the aquifers in excess of the recharge rate, causing a "mining condition." [Id. at 1313.]

The court then further emphasized the state interest in this water by saying: "The state interest in providing a system for utilization of this depletable and vital resource can scarcely be doubted." [Id. at 1318.]

In the first legislative opportunity after the *Huston* case decision, in the same year, land developer and other interests prevailed upon the legislature to pass a law reversing that decision by providing that rights to nontributary ground water could be adjudicated under the 1969 Act and that all decrees previously entered would be validated even though obtained through procedures the court had said could not be followed. [Sess. Laws of Colo., First Reg. Sess., 1983, Vol. 3, pp. 2079, 2080.] Then in 1985, the legislature passed what is commonly known as Senate Bill 5 [Sess. Laws of Colo., First Reg. Sess., 1985, pp. 1160-1169], providing that the nontributary ground water outside designated ground water basins would be allocated on the basis of the ownership of the overlying land and that the allocation would be on the basis of an aquifer life of 100 years, in other words, on the assumption that the water would be used up in 100 years.

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An Interview with John Echohawk

CU Law Professor Charles Wilkinson conducted this interview with John Echohawk on March 2, 1993, as part of his Advanced Natural Resources seminar. Echohawk, a Pawnee, is the executive director of the Native American Rights Fund, in Boulder, Colorado, where he has worked since its founding in 1970. In 1991, the National Law Journal named him as one of the nation's 100 most influential attorneys. Echohawk served on President Clinton's transition team for the U.S. Department of the Interior, and was the Natural Resources Law Center's 1993 Holme Roberts & Owen Distinguished Visitor.

Charles Wilkinson: John, tell us about growing up, and about your family.

John Echohawk: I grew up in Farmington, New Mexico — born in Albuquerque, and after working throughout the West my family moved to Farmington when I was five. I was raised there and went to public school. There are six children in our family. I have two older sisters and three younger brothers. Over the years we've all managed to get a college education or law

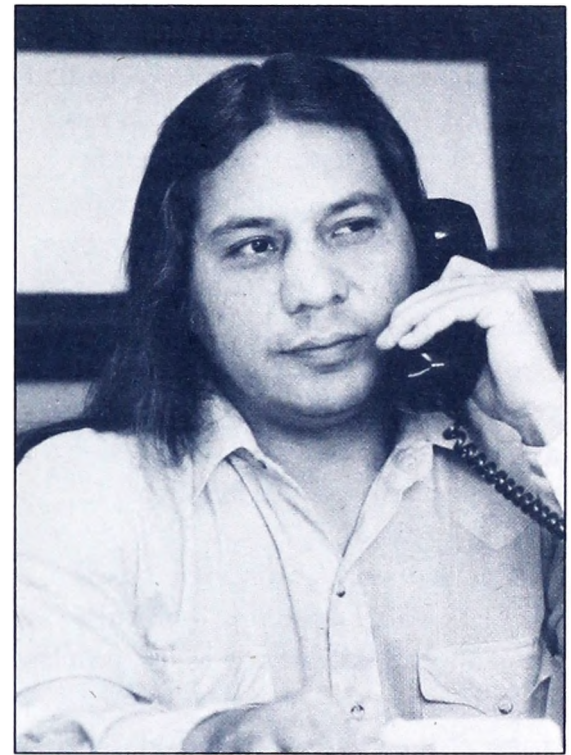
degrees. My oldest sister is a law office administrator in Houston. My other sister, Lucille, works for the Council of Energy Resource Tribes in Denver. My brother Fred has been working with the Northern Colorado Conservancy District and is living in Louisville, Colorado. My brother Larry is the Attorney General of Idaho, and my youngest brother who is now deceased, Tom, was a partner in the Fredericks & Pelcyger law firm here in Boulder.

CW: All of you are members of the Pawnee Tribe?

JE: Of Oklahoma.

CW: And what did your dad and mom do in Farmington?

JE: My grandparents on my father's side passed away when he was young, so he left Oklahoma when he was in high school and went out to live with his uncle in New Mexico. He went to high school there, met my mother, and basically decided to stay. He put in two years at the University of New Mexico. He didn't finish, though. He went to work and got involved in the land



John Echohawk (Pawnee), Executive Director, Native American Rights Fund. Photo courtesy of NARF.

surveying business and ended up with his own small business there in Farmington. Most of his clients were energy companies — both large and small — that were getting leases on the reservations around there. Farmington is surrounded by the Navajo, Ute Mountain Ute, Southern Ute, and Jicarilla Apache Reservations. There was a lot of oil and gas in that area, and he knew that terrain very well and was very good at what he did, and had a lot of clients there. It was called Four States Engineering Company. As a kid I worked with him from time to time, particularly during the summer, and through that experience got to see all of that whole Four Corners area to survey these leases. They really didn't have any roads in that area. It was quite an experience growing up in a situation like that and have a chance to see the country.

CW: When you were growing up did you have a sense of racism?

JE: Well, it was during the 1950s — the tribal termination era — and the sense of the country I think at that time was really having no vision of any future for Native American people other than assimilation and termination. And it was just a matter of time until our tribe was terminated and until the tribes in that Four Corners area

Magraw Speaks on NAFTA to Overflow Crowd

Law Professor Daniel Magraw, on leave from the University of Colorado to serve in Washington as Associate General Counsel for International Affairs at the U.S. EPA, addressed the environmental implications of the North American Free Trade Agreement before an overflow crowd at the Law School on November 9. Magraw has represented the U.S. in negotiations of environmental provisions of NAFTA and the supplemental agreements on environmental issues. The program was jointly sponsored by three activities within the CU Law School—the Natural Resources Law Center, the Colorado Journal of International Environmental Law and Policy, and the Doman Society of International Law—as well as the Colorado International Trade Office; the Colorado Center for Environmental Management; and the law firm of Holme Roberts & Owen.



time until our tribe was terminated and until the tribes in that Four Corners area would be terminated, and there was just no vision of any future other than eventual termination and assimilation. As a result of that, I don't think the tribes in that area were well understood at all. I think they were looked down on. I think, of course, things have changed quite a bit since then, but all those changes really happened after I graduated from high school there.

CW: Are you saying that a young Indian person in high school such as yourself was made aware of this inevitability? Was that something you were told and seemed inevitable to you?

JE: No, it wasn't really even discussed, but that's what I picked up — that the future was assimilation and Indian people had nothing to say about that. It was only a matter of time before it happened, and there was virtually no discussion of it. That was just a given. I mean, that was federal policy, and beyond debate.

CW: Was there much thought at that time about preserving an Indian identity?

JE: There were no options. The impression I had is that it was cut and dried. There were just no options — it was just a matter of time. All the tribes were to be terminated.

CW: Now, you went down to New Mexico as an undergraduate, and do I remember you were president of the student body?

JE: In high school and in law school.

CW: In the mid 1960s in college at New Mexico, what was your sense of Indian issues and Indian presence?

JE: Basically the same impression. There was no study or focus on these issues, and as far as I knew the federal policy was unchanged. I got into law school and things changed.

CW: Were you then beginning to think of possibly doing something with Indian people when you decided to go to law school?

JE: No, as I said, nothing had changed in my experience through college. I simply focused on becoming a lawyer, which I decided to do my last year of high school, and just proceeded with that plan. I had

applied to different law schools, including New Mexico. I went by there one day during my senior year to see if they'd gotten my LSAT scores and everything was in order. And they invited me to the dean's office and told me about the Indian Law Scholarship Program that was starting up. This was summer of '67. The Office of Economic Opportunity was basically heading up the War on Poverty. In terms of Native American programs, one of the things they were trying to do was to try to increase the number of Indian professionals and decided to start with the law profession. Their surveys indicated there was a dozen Indian lawyers in the whole country, but if we were proportionally represented, we

*during the 1950s . . .
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should have had something like a thousand lawyers. I was unaware of that. I just didn't really know anything about that, and when I learned that, it was a shock. But at the same time, not too surprised because Indian people were in pretty bad shape. I guess I wasn't too surprised. Again, not having any Indian programs or any focus on any of these issues, at any level in the education system, I didn't know very much about the other Indian students in law school. I think about twenty of us started in the summer program, an eight-week session to give us a look at law school and help us decide whether we really wanted to be there. About half of that first group were undergraduates — they got started so late in recruiting, they took undergraduates as well, hoping that they would come back subsequently. Some of them did. One of these undergraduates

that summer was Leslie Marmon Silko, now a writer.

CW: Now, when did you first become aware of the Native American Rights Fund?

JE: As we went through law school and started finding out about potential the law had for tribal rights, we started thinking that such a program would be very, very helpful. Of course, by that time we had the other minority legal defense funds and the success they had enforcing civil rights in the courts. And so, by our second year, we began dreaming about an organization.

CW: So were the Indian law students one of the lobby forces or groups that lead to the formation of NARF, or were you just hoping there would be one?

JE: I think while we were thinking about it, the Ford Foundation provided the funding to set up NARF.

CW: And then you went with NARF immediately after law school?

JE: Not exactly. I went to California Indian Legal Services and started working in their Escondido office. Just a few weeks after I got out there, California Indian Legal Services got a grant from Ford to start the Native American Rights Fund, and I was asked to go there.

CW: And that eventually ended up here in Boulder. I was fortunate to walk in the same door. One very large series of events that followed was the energy build-up in the Colorado Plateau; maybe you could just walk us through that.

JE: I suppose that it goes back to the times working with my father surveying oil and gas leases, and somewhere too surveying some of the uranium leases out that way. It was just big business out there, and I had no sense that it was ever going to end or really change in any way. It started changing with the advent of the environmental movement, and the tribal rights movement as well.

CW: John, before that was there a sense that Indian land was just kind of like any other land that you went out and surveyed, and struck oil or gas or found uranium, and the paid the tribe royalties; or was there a sense that Indian lands were different in some significant way?

JE: No, I don't think there were any differences, except for the fact that you had to work through the Bureau of Indian

Affairs for leases. There was very little notion about tribal governments. Very little of that at all — the termination mentality around it was dominant. But again, like I said, changes began with the environmental movement and the tribal rights movement. And that's about the time that you and I came along and got involved in some of the litigation in that area over some of the energy developments that they had planned at that time which I think was really kind of at the height of the energy development.

CW: What was NARF's participation and the strategies that you followed?

JE: It's been so long ago, I can't remember all the details. I just remember a series of environmental lawsuits, and one involving NEPA [the National Environmental Policy Act]. I'm not sure I remember all the others. But the one I was most

represent them, and our legal research validated that. We felt the tribal constitution basically required that Tribal Council to be certified, be controlled by traditional leadership and it wasn't and never had been since the late 1930s. After the constitution had been adopted, the traditionalists found it too difficult a system to operate, so they basically discontinued the whole notion of the Tribal Council. The federal government resurrected it in the 1950s to be able to sign energy agreements. And all that was done without the participation of the Hopi traditional leaders as required by the constitution. So that was the basis on which we challenged the lease.

CW: Just to back up a bit, tell us a little bit about Black Mesa and its importance to the Hopis.

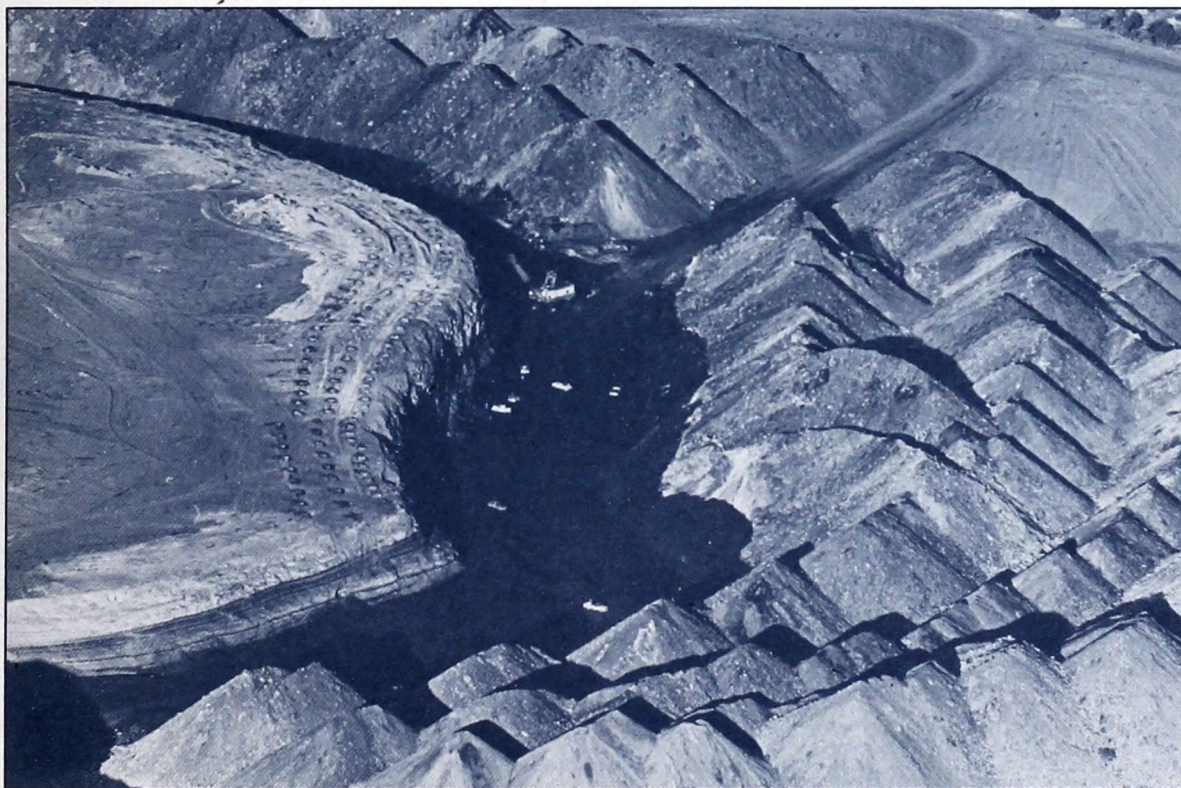
JE: The Hopis are very, very traditional

As we went through law school and started finding out about potential the law had for tribal rights, we began dreaming about an organization.

not include any kind of notions like developing a coal mine and stripmining. That's something I think they felt was sacrilegious, and shouldn't be done. And that's, basically, why they sought us out. They felt very strongly that the coal mine should not be at Black Mesa. They had a very strong sense that there would be environmental consequences to that as well.

CW: And the government set up under the Indian Reorganization Act was not a traditional tribal council?

JE: Yes, some of the history of that was that the tribes were all supposed to vote. For the traditional Hopi, there was just no way they were going to have anything to do with that, because they relied on their traditional government, their traditional system, and the IRA notion was just too different for them. There wasn't even a chance they would even accept it. So the BIA had tried to interest them by modifying the stock constitution they were introducing to the tribes — they modified that substantially, where this tribal council constitutional form of government would be controlled by the traditional leaders in each of the villages. And that's the basis on which they sold it to the Hopi people. The Hopi people ended up passing it, and of course, they only had to have 30% of the eligible voters voting in an election, and the majority of that 30% approved it. And that's what happened in Hopi country. It was an IRA government controlled by the traditional leaders on paper only. I think they just followed



Peabody Mine #1, Black Mesa, Arizona. Photo courtesy of the Native American Rights Fund.

directly involved in was the one that we filed against the Secretary of the Interior, trying to void the coal mining lease at Black Mesa. That was an area that was jointly owned by the Navajo Tribe and the Hopi Tribe, and the Hopi clients we were representing had come to us basically complaining about the validity of that lease, because of the illegality of the Hopi tribal government. That government did not

people living in seven or eight villages that are historically kind of semi-independent from each other. They have been in that area since just about the beginning of time. The documentation goes back to at least 1100 A.D. when they know the Hopis were in place. Documentation on the Navajo is that they come in that area around 1700. The Hopis depend upon raising sheep and growing a few crops. Their traditions did

standard BIA policy, which is try to do some economic development for tribes whether they wanted it or not, and they went out and negotiated leases and brought them to the Tribal Council and recommended they sign them because it meant some jobs and money. And that's about the extent of it. I know it was standard leases and practices. Tribes had little choice other than to sign it or not and that was about it.

I think they just followed standard BIA policy, which is try to do some economic development for tribes whether they wanted it or not . . .

CW: Now, in your attempt to try to overturn the leases, representing a group of individual Hopis, you had the doctrine of sovereign immunity to contend with — tribal sovereignty — and NARF's policy was not to sue any tribes. How did you go about that?

JE: We were proceeding only against the Secretary of the Interior. We did not join the Hopi Tribal Council, as it claimed it represented the Hopi Tribe. We did not feel like that was necessary. We didn't feel like the Hopi Tribal Council was clothed with sovereign immunity since basically the gist of the lawsuit was they were an illegally-constituted tribal government, and as such they did not enjoy sovereign immunity. So that was what we argued. The courts held Tribal Council was a representative of the Tribe and as such enjoyed sovereign immunity — they couldn't be sued without their consent, they were an indispensable party to the litigation, so it was dismissed.

CW: What is your sense about what has happened since then in terms of tribes becoming more significant actors in taxation and self-determination?

JE: I think what came to light through the Black Mesa lease and some of the other power plant leases and developments was that there were a lot of people interested in issues, and a lot of them were pretty sophisticated people who were able to analyze the leases and business terms and basically conclude that they were grossly unfair to the tribes. That if the tribes would have had expert representation or representation equivalent to what the energy companies had, that those business

bureaucrats with a little training, but not very much. But certainly no match for the negotiators from the energy companies. And that was reflected in those leases. And when they were analyzed, it was just clear that the tribes got taken — not only in those, but going back some years into the 1950s to some of those leases, and they were the same thing. I mean, the tribes were just getting rolled big time by the energy companies on those leases. The federal government — the Bureau of Indian Affairs — was doing that, and the tribes became very aware of that through this process. They were in no way able to stop very much of the development that happened



Bessie Etsitty Begay standing in the ruins of her summer hogan, destroyed by the Peabody Coal Company, 1970. Photo courtesy of the Native American Rights Fund.

arrangements would have been vastly different. And that pretty well squared with the assessment of our clients and tribes in that area, and the tribes around the country, because as I said before, the tribes never had any role in negotiating these leases. It was all done by the Bureau of Indian Affairs, and when you look at who worked at the Bureau of Indian Affairs, they were

down there. One of the things that did happen was the way that the tribal energy business is done — it changed dramatically. That whole experience led to the formation, just a couple years later, of the Council of Energy Resource Tribes.

CW: When did that start up?

JE: It was in 1975. Everybody came to this realization that we just couldn't

continue to do business the way we had, and the only way that was going to change was if the tribes took control. The idea of the Council of Energy Resource Tribes was to band together to go after the federal funds that supported this whole BIA leasing arrangement, and get that money away from the BIA bureaucrats and get that to the tribes. And then the tribes hired the expertise that they needed to negotiate their own energy development.

CW: Now, what do you think of the tribal capability today when it comes to energy development?

JE: It is very sophisticated, equal to if not better than what the energy companies have, without a doubt. What has happened is now tribes basically go out and do all the negotiation, and they get the deal together that *they* like, and then they take it to the BIA and tell them to sign it. So the whole thing has just flip-flopped. Of course, the BIA doesn't have much choice when those situations come up. Things had changed dramatically. And that's really the lesson, I think, from the whole issue. Tribes like the Northern Cheyenne, who have a lot of coal under their land in Montana, learned from the whole experience too. There's a lot of interchange between the Northern Cheyennes and the Hopis and Navajos. They decided not to pursue coal development. And, of course, that's still an issue up there. It's particularly tough on them, because they're one of the poorest tribes in the country — very poor — and they're sitting on tons and tons of coal, and the coal is real valuable. And it's just an ongoing, everyday issue with the Tribe — it still is. But so far they've held out even though there are mines all around them up there.

CW: John, I remember seeing you around one of the Hopi traditionalists, and I could see on your face the kind of respect you felt for him. Looking back on it over more than twenty years now, how do you assess it all in terms of being a good thing or bad thing for the Hopis? Maybe you could comment a bit on the Navajos too, in the sense that Black Mesa is being mined. How do you piece all of that together — the really profound sense of loss and then also some financial benefits coming in?

JE: Well, each tribe has to decide that

for itself. It's a very difficult decision to make, and the Navajos have made their decision. I think it's still questionable about whether the decision the Hopis made is really a Hopi decision or not. The illegality regarding their tribal government has continued up to this date. There are skirmishes between the traditional leaders and the progressives down on the Hopi Reservation. Last summer, it looked like the Hopi Tribal Council could not muster a quorum because of the resistance and boycott by traditional leaders. So that's still an issue and has been off and on over twenty years. These kinds of starts and stalls by the Hopi Tribal Council and continuing rift between progressives and traditionalists continues down there.

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CW: What prospects do you see for coalition-building with the environmental community?

JE: Well, I think we've done a lot just in the last five or six years, and I think we're going to do a lot more. I didn't really know the environmental community very well until the last six or seven years. And I don't think *they* knew the Indian community very well, and we've gradually kind of been learning about each other. [In 1986 Robert

Redford convened a conference] down in Navajo country — a conference specifically between environmentalists and Indians — because he was just astounded that communication was nonexistent. There was just no relationship there, and we validated that at the conference: "Yes, that's exactly it." These kind of issues are difficult. One of the things that happened is that we asked the environmental organizations about Indian board members and staff, and I think there was just one Indian board member at that time, and that has changed somewhat since then.

CW: You are on the board of the Natural Resources Defense Council?

JE: Yes. Since that time, too, these environmental justice issues have become very prominent in the environmental movement. And environmental organizations know they need to pay more attention to these environmental issues as they impact minorities. And the tribes are right in there. They're going through an education process and re-ordering things. That process I think is going to be accelerated.

CW: Before Bruce Babbitt was *Bruce Babbitt* — a few years ago — he was quoted in an article in *The New York Times*. "To understand John Echohawk, you have to understand the charisma of silence." John, this talk has been really wonderful. Do you have any thoughts on Babbitt's remark, or anything else you'd like to finish up on?

JE: The reason Babbitt said that was because we were negotiating, and that was the only response I had to some of the outrageous proposals that he made! And he knew it, too! Really, he was very instrumental when he was with the Western Governors' Association helping us shape this Indian Water Rights Settlement Policy we have got going now. That's really been a joint effort of the tribes and the states and the western businesses to get the various administrations and Congress ready to accept Indian water rights settlements. We've got to do something about it, and it's a big problem. It costs two or three billion, and we've got to get ready to pay unless we want to have big-time winners and losers in litigation. So it's good to have Babbitt in there. That's one of the first proposals due out of the new administration. ♦

Recent Publications

Recent Publications and Materials of the Natural Resources Law Center

For sales within Colorado, please add 6.91% sales tax. For postage and handling charges see chart below. Contact the Center for a full list of publications.

Policy Papers

- PP01 "America's Water: A New Era of Sustainability. Report of the Long's Peak Working Group on National Water Policy," Dec. 1992. 12 pgs. \$10.

Books:

- BK06 *Controlling Water Use: The Unfinished Business of Water Quality Protection*, David H. Getches, Lawrence J. MacDonnell, Teresa A. Rice, 1991, \$22.
- BK04 *Proceedings of the Sino-American Conference on Environmental Law, Beijing, 1987, 1989*, \$12.
- BK03 *Water and the American West: Essays in Honor of Raphael J. Moses*, David H. Getches, ed. 1988, \$15.
- BK02 *Tradition, Innovation & Conflict: Perspectives on Colorado Water Law*, MacDonnell, ed. 1987, \$12.

Research Reports

- RR11 "Agricultural to Urban Water Transfers in Colorado: An Assessment of the Issues and Options," Teresa Rice and Lawrence MacDonnell. 82 pgs. 1993. \$10.
- RR10 "Instream Flow Protection in the West," revised edition, Lawrence J. MacDonnell & Teresa Rice, editors. 1993. \$22.
- RR09 "Recreation Use Limits and Allocation on the Lower Deschutes," Sarah Bates, 76 pgs. 1991. \$8.
- RR08 "Facilitating Voluntary Transfers of Bureau of Reclamation-Supplied Water," Lawrence J. MacDonnell and others, Vol. I, 132 pgs. (\$10) & Vol. II, 346 pgs. (\$15), or both volumes for \$22, 1991.
- RR07 "Wetlands Protection and Water Rights," MacDonnell, Nelson & Bloomquist, a Report to EPA Region VIII, 1990, 50 pgs. \$8.
- RR06 "The Water Transfer Process as a Management Option for Meeting Changing Water Demands," Lawrence J. MacDonnell and others, Vol. I, 70 pgs. (\$10) & Vol. II, 391 pgs. (\$15), or both volumes for \$22, 1990.
- RR6A "Transfers of Water Use in Colorado," MacDonnell, Howe & Rice, 1990 (chapter 3 from Vol. II above) 52 pgs. \$5.

Western Lands Reports

- WL01 "The Western Public Lands: An Introduction," Bates, 1992. \$8.
- WL02 "Discussion Paper: The Changing Economics of the Public Lands," MacDonnell, 1993. \$8.
- WL03 "Discussion Paper: The Changing Management Philosophies of the Public Lands," Bates, 1993. \$8.

- WL04 "Discussion Paper: Managing for Ecosystems on the Public Lands," Bates, 1993. \$8.

- WL05 "Discussion Paper: Public Lands Communities," Bates, 1993. \$8.

- WL06 "Discussion Paper: State and Local Public Lands," Rice, 1993. \$8.

Conference Materials - Notebooks and Audiotapes

These materials are certified for Home Study CLE credit by the Colorado Board of Continuing Legal and Judicial Education.

- CF15 "A New Era for the Western Public Lands," 3-day conf. Sept. 1993, audiotapes \$100; videotapes \$200. For Symposium Issue, contact Univ. of Colorado *Law Review*, (303) 492-6145.
- CF14 *Water Organizations in a Changing West*, 3-day conf. notebook, June, 1993, \$75; audiotapes \$150
- CF13 *Groundwater Law, Hydrology and Policy in the 1990s*, 3-day conf. notebook, June, 1992, \$75; audiotapes \$150. One CLE ethics credit.
- CF12 *Innovation in Western Water Law and Management*, 3-day conf. notebook, June, 1991, \$60; audiotapes, \$150.

Western Water Policy Discussion Series Papers

- DP01 "Values and Western Water: A History of the Dominant Ideas," Wilkinson, 1990, \$6.
- DP02 "The Constitution, Property Rights and The Future of Water Law," Sax, 1990, \$6.
- DP03 "Water & the Cities of the Southwest," Folk-Williams, 1990, \$6.
- DP04 "Water Rights Decisions in Western States: Upgrading the System for the 21st Century," Shupe, 1990. \$6.
- DP05 "From Basin to 'Hydrocommons': Integrated Water Management Without Regional Governance," Weatherford, \$6.
- DP06 "Water, The Community and Markets in the West," Ingram & Oggins, \$6.
- DP07 "Water Law and Institutions in the Western United States: Early Developments in California and Australia," Maass, 1990, \$6.
- DP08 "The Changing Scene in the American West: Water Policy Implications," Schad, 1991, \$6.
- DP09 "Using Water Naturally," Rolston, 1991, \$6.
- DP10 "Implementing Winters Doctrine Indian Reserved Water Rights," Chambers & Echohawk, 1991, \$6.

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- OP29 "A Decade's Experience in Implementing a Land-Use Environmental Impact

Assessment System in Israel," Rotenberg, 1993, \$5.

- OP28 "Restoring Faith in Natural Resource Policy-Making: Incorporating Direct Participation Through Alternative Dispute Resolution Processes," Cottingham, 1992, \$5.
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- OP26 "Accommodating, Balancing, and Bargaining in Hydropower Licensing," Lamb, 1992, \$5.
- OP25 "Restoring Endangered Ecosystems: The Truckee-Carson Water Rights Settlement," Yargas, 1991, \$5.
- OP23 "A New Look at Irrigation Water Supply Organizations: Reallocation, Conservation, Water Quality, and Governance," Davidson, De Young, Driver, Smith, 1991, \$8.

Special Purchase

VRAN *Colorado Water Law*, 3-Volume Set by George Vranesh, 1987, Originally \$285, now available for only \$95.

About New Publications

The Center has just completed a research report, "Agricultural to Urban Water Transfers in Colorado: An Assessment of the Issues and Options." (RR11) Supported by a grant from the Colorado Water Resources Research Institute, the research summarizes the increasingly rich set of options available to facilitate the shift of water from agricultural to urban use in the western states. The report suggests that the exclusive reliance on permanent water rights transfers with little or no regard for third party effects is an unnecessarily disruptive means of supplying new water needs and recommends changes in Colorado law to encourage water banking and transfers of saved water, as well as to address the third party effects of transfers.

A completely revised and updated version of *Instream Flow Protection in the West* (RR10) is now available. Featuring detailed analyses of the laws and programs of 13 western states as well as eight chapters covering such topics as economic valuation of streamflows, federal laws and programs, and methodologies for measuring streamflow requirements, this report provides the most comprehensive treatment available of the important legal developments related to in-place uses of water.

To order or for more information, please call, write, or fax the Center. Checks should be payable to the University of Colorado. Please add 6.91% sales tax - only in Colo.

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Guest Opinion

from page 4

Further to promote and facilitate the usage of this nontributary ground water and its withdrawal without regard to conservation interests or even the interests of landowners who might years in the future wish to use the water, the legislature in Senate Bill 5 provided that lowering the water level or the water pressure in the aquifers would not be deemed to cause injury. [C.R.S. § 37-90-137(4)(c).] These two factors are the ones that would indeed cause injury to others by making recovery of the water more costly and more problematical. The legislature in effect provided that what was true would not be true, what was clearly injury would not be injury.

The purpose of this provision regarding injury was to allow free unfettered use of this nontributary resource. As the water level and pressure are lowered the cost of obtaining the water increases, wells have to be deeper, pumps have to be stronger. Assuming that the legislation allocating the water to the owners of the overlying land is valid, all landowners are, because of this one provision, not treated equally. Those who take first have the advantage. Delay in using is cost penalized. The pressure is to use now while the taking is easy. A situation directly contrary to conservation and restraint is created. The concept long fundamental in our water law that you cannot use your right to water in a manner that would injure

others is violated, such concept being written in the very law regarding wells [C.R.S. § 37-90-137], which Senate Bill 5 amended.

This allocation on the basis of landownership is in effect applying a riparian concept to nontributary ground water, allocating it to the adjacent (upward) land. Under the riparian concept, the owner of the land on the stream has the right to use a reasonable amount of the water on that land. Reasonable use of nontributary ground water might be that usage on the land to which it is allocated that is consistent with the conservation of this resource.

Isn't it sheer folly in terms of our welfare and the welfare of future generations to provide that this nontributary ground water may be used up in 100 years? As the Supreme Court has said, water in the streams replaces itself naturally and thus it is not really lost. The water in the nontributary aquifers does not replace itself and therefore it is lost as it is used. Shouldn't it only be consumed if water levels and pressure are maintained by planned recharged or very limited usage as a protection for emergencies and for future generations? Shouldn't it be maintained to a reasonable degree to be available in the public interest for beneficial use in the case of drought or other factors of great public concern? We are told now by scientists of great distinction that the gradual diminishment of precipitation in this area of the country is a real probability as a result of

global warming. Perhaps the disaster that this man made degradation of the atmosphere portends could be alleviated or even precluded by wise control of this great natural resource in the public interest.

The legal, ethical and environmental propriety of Senate Bill 5 and the practices that have followed with respect to nontributary ground water should be questioned, particularly the allocation of the water, the depletion of this resource within 100 years and the patent misstatement that lowering the water level and pressure do not cause injury. Assuming that allocation of the water on the basis of the ownership of the overlying land is proper, is it legal, constitutionally or statutorily, for the water to be sold for use separate and apart from the land? That is carrying the digression from the Huston case's holding one step further, putting this water in commercial transactions for private profit.

With the very fabric of our society threatened by climatic conditions and the profligate consumption of natural resources and with the conservation of these resources being what should be a paramount consideration, that society through its legislative and judicial systems, its activators and protectors of public interest, urgently must review these questions of water allocation and use. What is happening to nontributary ground water under the 1985 Act is contrary to the protection of the environment, to the conservation of natural resources, to the wisdom of our Supreme Court, to the considered and wise progression of our water law and to the public interest.

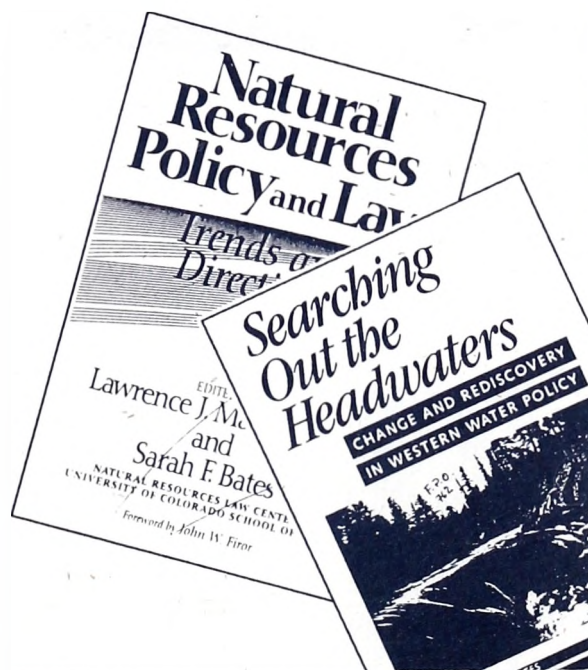
This exploitation of the deep aquifer water is but a part of the human exploitation of virtually all of Nature's substances and processes. The despoliation in decades of those marvelous resources — soil, water, minerals, vegetation — that have been created over millions of years is absolute immorality and absolute folly in terms of the life and beauty of this planet upon which the quality of human existence depends. If that life and beauty are to be preserved and as needed restored, the human species, the destroyer that dominates the Earth, must come to plan and implement a compassionate and rational stewardship of the planet with respect for, with conservation of, and in harmony with Nature, its substances and processes. ♦

Center Books from Island Press

Two Center books have been published by and are available from Island Press, Dept. RLN (1-800-828-1302). Please do not order from the Center.

Searching Out the Headwaters: Change and Rediscovery in Western Water Policy, Sarah F. Bates, David H. Getches, Lawrence J. MacDonnell, and Charles F. Wilkinson, 1993

Natural Resources Policy and Law: Trends and Directions, ed. by Lawrence J. MacDonnell and Sarah F. Bates, 1993



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The Natural Resources Law Center

The Natural Resources Law Center was established at the University of Colorado School of Law in the fall of 1982. Its primary goal is to promote the wise use of natural resources through improved understanding of natural resources issues. The Center pursues this goal through three program areas: research, public education, and visitors.

Resource Law Notes is a free newsletter of the Center, published three times a year — fall, winter, and spring.

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Fri. Feb. 25: NRLC/Boulder County Bar Association symposium

Mon.-Weds. June 13-15: Annual June Conference: "Constitutional Limits on Environmental Regulation: Land, Water, and Resources Development and Use."

"Hot Topics in Natural Resources"
Continuing Legal Education lunch series. (Held at noon, Holland & Hart law firm, 555 17th St., Denver. Charge for lunch and registration; preregistration required.)

- **Tues. Feb. 8:** "Federal Enforcement of Environmental Crimes"
- **Tues. March 8:** "The Role of the PUC in Colorado's Sustainable Energy Future"
- **Thurs. April 7:** "Coalbed Methane Ownership and Liability Issues"

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Resource Law Notes
Natural Resources Law Center
University of Colorado School of Law
Campus Box 401
Boulder, CO 80309-0401
Phone (303) 492-1286
FAX (303) 492-1297

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